

# MINUTES

## RANDOLPH COUNTY ZONING BOARD OF ADJUSTMENT

**November 6, 2008**

The Randolph County Zoning Board of Adjustment met at 6:30 p.m., on Thursday, November 6, 2008, in the Commissioners' Meeting Room, Randolph County Office Building, 725 McDowell Road, Asheboro, North Carolina.

1. **Chairman Jim Rains** called to order the Randolph County Zoning Board of Adjustment meeting at 6:30 p.m.
2. **Hal Johnson**, Planning Director, called roll of the members: **Jim Rains**, Chairman, present; **Lynden Craven**, Vice Chairman, present; **Larry Brown**, absent; **Phil Ridge**, present; **Chris McLeod**, present; **Reid Pell**, present; **Wayne Joyce**, present; and **Danny Shaw**, Alternate, present, substituting for Larry Brown. **County Attorney Darren Allen** was present for the meeting.
3. **Craven** made the motion, seconded by **Pell**, to **approve** the Minutes of the October 7, 2008 Randolph County Planning Board meeting. The motion passed unanimously.
4. **Darren Allen**, County Attorney, read the rules to be followed during this hearing process.

*The only matter before the Planning Board today is an appeal of an administrative interpretation of the Planning Director, Hal Johnson. The appellants, represented by Mr. Robert Hornik, have challenged certain decisions of the Planning Director interpreting Article XII of the Randolph County Unified Development Ordinance, and applying it to find no illegal expansions of nonconforming uses. The contents of the decision and of the appeal are included in the agendas.*

*Appeals of administrative determinations of the Planning and Zoning Director are treated as quasi-judicial hearings in Randolph County. This means that the Planning Board, sitting as a Board of Adjustment, will receive evidence and apply Article XII to the sworn testimony presented before the Board.*

*When the Board sits as a quasi-judicial body, the members of the Board must sit and act as impartial fact-finders. Each member of the Board must be free from financial interest, free from a close family or business connection, and free from any fixed opinion that is not susceptible to change. If any member of the Board feels that he is improperly biased,*

*he should so inform the Board and ask permission for recusal.*

*In addition, when the Board sits as a quasi-judicial body, the members of the Board must judge the facts based only upon the sworn evidence presented to the Board. No prior communications with anyone else can be considered in deciding the facts of this case.*

*Quasi-judicial hearings are less formal than court proceedings, but the Board will generally observe the Rules of Evidence. This means that the Board is free to disregard testimony offered with no foundation of personal knowledge; the Board may disregard hearsay; and the Board may consider opinions only upon proper foundation.*

*The manner in which the appeal will be heard is as follows:*

- (1) First, the appellants and the appellees will be afforded the opportunity to present opening remarks*
- (2) Second, the appellants will present testimony. For each witness presented before the Board by the appellants, the appellees will be allowed an opportunity for cross-examination.*
- (3) Third, the appellees will present testimony. For each witness presented before the Board by the appellees, the appellant will be allowed time an opportunity for cross-examination.*
- (4) Finally, the appellants and the appellees will be afforded the opportunity to present closing remarks.*

*After the appeal has been presented by the parties, the Board will publicly deliberate its decision. In its deliberations, the Board must decide the facts and apply the law to those facts. The burden of proving facts lies with the appellants. The Board can only rule in favor of the appellants if four-fifths of the members of the Board find that the appellants have met that burden. The Board must uphold the decision of the Planning Director if no members or less than four-fifths of the members of the Board find that the appellants have met that burden.*

*Regardless of the ruling of the Board, the Board will formally enter its decision by approval of an order at the next regularly scheduled meeting of the Planning Board on December 2, 2008.*

5. **Chairman Rains** administered the oath.

*Swearing in of the Witnesses - "Do you swear or affirm that the information you are about to give is the truth, the whole truth, and nothing but the truth, so help you God."*

Nine (9) people took this Oath.

6. **Claude Winslow, Asheboro, North Carolina, is appealing the decision of the Randolph County Planning & Zoning Director that zoning permits issued to McDowell Lumber Company, 2473 Falling Oak Road, Concord Township, Asheboro, North Carolina, are in compliance with the Randolph County Unified Development Ordinance and that there is no action necessary to enforce current zoning classifications or regulations with regard to McDowell Lumber Company property on Falling Oak Road.**

**Open Remarks**

**Bob Hornik**, Attorney, Chapel Hill, North Carolina, was present and stated he was representing Claude Winslow and Maxton McDowell, adjoining property owners of McDowell Lumber Company. Hornik explained that back a couple of months ago he filed this appeal with Hal Johnson, Randolph County Planning Director. Hornik said in mid-September he received a decision from Johnson of his appeal. Hornik said on October 18, 2004 McDowell Lumber Company filed an application for zoning change from LI to HI-CD. Hornik said today the property owned by McDowell Lumber Company on the east side of Falling Oak Road is currently zoned LI and their property on the west side of Falling Oak Road is zoned RA. Hornik said in November 2004 there were 3 or 4 building permits filed for expansions of the lumber company on the portion of property owned by McDowell Lumber Company zoned LI. One permit was for an 8,000 sq. ft. warehouse building addition, a second permit for a 4,000 sq. ft. addition to the pallet making building, and a third permit for a new structure for the drying of pallets located east of the warehouse addition. Hornik said there have also been subsequent additions and expansions to the lumber company facility. Hornik described a large crane added some time after January 2006 and a second pallet making building added after 2006. Hornik said anything added to this facility after October 18, 2004 should be

removed from the site because the property was not and is not zoned properly to make such expansions. Hornik said the "Table of Permitted Uses" in the Randolph County Zoning Ordinance does not allow either temporary or permanent lumber mills in LI or RA zones. Hornik said they realized that the existing use has been allowed to continue as a "non-conforming use." Hornik said the Zoning Ordinance says a use in existence on the day of adoption of the ordinance is granted a legal non-conforming status. Hornik said their position before this Board is that on October 18, 2004 McDowell Lumber Company began to seek rezoning of their property from a district where the use was not allowed to a district where it was allowed. Hornik said in May 2005 the County Commissioners authorized the rezoning of the property and in May 2005 they filed an appeal to this decision with the Randolph County Superior Court and the court found the rezoning of the property to be unlawful illegal spot zoning. Hornik said this decision was upheld in 2007 by the Court of Appeals. Hornik said in 2004 Tony McDowell, owner of McDowell Lumber Company, realized he had opponents to his property use, and notwithstanding that knowledge, proceeded with expansion of buildings, added a pallet drying operation, added the crane, etc. and as recent as 2008 he continued to expand his operation all in violation of the County Zoning Ordinance. Hornik said they are asking this Board to essentially tell the County Staff to enforce the County Zoning Ordinance. Hornik asked the Board to tell the Planning Staff they must require McDowell Lumber Company to remove anything added to the facility after October 18, 2004. Hornik said after that date everyone knew that the zoning on the property was not right. Hornik said his clients are not asking the Board to go back to 1987 as could be required. Hornik said the County Planning Staff knew and allowed the expansion that provided detriment to my clients. Hornik said the County Planning Staff does not have the authority to change the Zoning Ordinance or to enforce it just when they want to enforce it. Hornik said in the end the facts will show that McDowell Lumber Company continued to expand their use at their own risk. Hornik said his clients are asking this Board to reverse the decision of the Planning Director and to require all expansions be removed.

**Ben Morgan**, Attorney, Asheboro, North Carolina, was present and represented McDowell Lumber Company. Morgan said that this is a quasi judicial hearing and for the record he wanted it noted that Hornik has no first hand knowledge of the testimony he gave. Morgan said this is the third time this matter has been before this Board. Morgan said this is the same exact thing that Hornik's clients have requested in the past and been denied. Morgan said in 2007 the Superior Court essentially upheld the County ruling, and the trial court properly denied the appeal and said the zoning classification must be rolled back to the original designation given to the property in 1987. Morgan said that he

would not go into specifics during his opening remarks but they would show that McDowell Lumber Company has been in operation for 58 years with some type of lumber company/mill. Morgan said McDowell Lumber Company employs 73 people at this site. Morgan said in 1987 Randolph County enacted countywide zoning and at that time whatever was on the site was to be zoned for that use. Morgan said at that time it was incorrectly zoned. Morgan said in 1987 the McDowell Lumber Company was in existence on both sides of Falling Oak Road. Morgan said that his clients have made new improvements on the site to maintain the business. Morgan said that Hornik now says he is only seeking to roll back to 2004, but the appeal he filed requested 2000. Morgan said he felt this Board should uphold Johnson's decisions.

**Darren Allen**, County Attorney, said at this time the appellants shall present testimony of evidence.

### **Testimony of Evidence**

#### **Hornik called Hal Johnson, Planning Director, as his first witness.**

Hornik presented *Plaintiff's Exhibit #1* - Appeal form dated September 22, 2008 to the Randolph County Zoning Board of Adjustment. The exhibit included the following attachments:

- a. North Carolina Court of Appeals Report filed September 18, 2007,
- b. Memorandum of Judgement/Order of the Randolph County Superior Court, dated August 18, 2008,
- c. Letter to Hal Johnson, Randolph County Planning Director, dated August 27, 2008 from Robert E. Hornik, Jr., The Brough Law Firm.; Letter to J. Harold Holmes, Chairman, Randolph County Board of Commissioners, and Hal Johnson, Director, Randolph County Planning & Zoning, dated January 16, 2008, from Robert E. Hornik, Jr., The Brough Law Firm; Letter to Paxton Arthurs, Randolph County Chief Building Inspector, dated December 4, 2007, from Robert E. Hornik, Jr., The Brough Law Firm; North Carolina Court of Appeals Report filed September 18, 2007; 15 separate pictures of the site and adjoining property; Letter to Robert E. Hornik, Jr, The Brough Law Firm, dated December 7, 2007 from Paxton Arthurs, Randolph County Director of Inspections; Letter to Paxton Arthurs, Randolph County Director of Inspections, dated December 10, 2007 from Robert E. Hornik, Jr., The Brough Law Firm; Letter to Robert E. Hornik, Jr., The Brough Law Firm, dated December 17, 2007 from Paxton Arthurs, Randolph

County Director of Inspections; Letter to Robert E. Hornik, Jr. The Brough Law Firm, dated December 28, 2007 from Paxton Arthurs, Randolph County Director of Inspections; and Memorandum of Judgement/Order of the Randolph County Superior Court, dated August 18, 2008.

- d. Letter to Mr. Robert Hornik, The Brough Law Firm dated September 12, 2008 from Hal Johnson, Randolph County Director of Planning & Zoning.

**Hornik** asked Johnson if he recognized the documents of *Plaintiff's Exhibit #1*. **Johnson** answered yes. **Hornik** asked Johnson if he was the Planning Director for Randolph County and **Johnson** answered yes. **Hornik** asked Johnson how long he had been the Director, and **Johnson** answered 27 years.

**Hornik** asked Johnson if he was familiar with the Randolph County Unified Development Ordinance, and **Johnson** answered yes. **Hornik** said that he had sections of this Ordinance that he printed off the County website this morning and hopefully they are accurate. **Hornik** presented *Plaintiff's Exhibit #2* - Adopting Ordinance Pages of the Randolph County Unified Development Ordinance. **Hornik** asked Johnson if he was familiar with these pages of the Randolph County Unified Development Ordinance, and **Johnson** answered yes. **Hornik** asked Johnson to read the high-lighted portion, Section 5, of these pages. **Johnson** read:

*"Section 5. No structure shall be constructed, erected, modified, converted, placed or maintained, and no land use commenced or modified except as specifically, or by necessary implication, authorized by this Ordinance. Except as herein provided, no building, structure, or premises shall be hereinafter used or occupied and no applicable permit granted that does not conform to the requirements of this Ordinance."*

**Hornik** asked Johnson to paraphrase what this means. **Johnson** said that buildings or uses of lands shall not be expanded unless the use conforms with the requirements of the Ordinance. **Hornik** asked Johnson if the use is required to be in compliance with the Zoning Ordinance, and **Johnson** answered that is correct. **Hornik** presented *Plaintiff's Exhibit #3* - Definition Section of the Randolph County Unified Development Ordinance. **Hornik** asked Johnson to check to see if this was a true and accurate copy of pages I-1, I-2, I-3, and I-13 of the Definition Section of the Randolph County Unified Development Ordinance, and **Johnson** answered that it is. **Hornik** asked Johnson to read from page I-2 the high-lighted definition of the "alterations." **Johnson** read:

*“Alterations: The word “alteration” shall included any of the following:*

- a. Any addition to the height or dept of a building;*
- b. Any change in the location of any of the exterior walls of a building;*
- c. Any increase in the interior accommodations of a building.*

**Hornik** asked Johnson to read into the record from page I-3 the definition of the word “building.” **Johnson** read:

*“Building. Any structure having a roof supported by columns or by wall; and intended for shelter, housing or enclosure of animals.”*

**Hornik** asked Johnson to read from page I-13 the high-lighted definition of the word “use.” **Johnson** read into the record:

*“Use. The purpose for which land or a building or structure is arranged, designed or intended, or for which either land or a building or structure is, or may be, occupied or maintained.”*

**Hornik** asked Johnson to read into the record from page I-13 the high-lighted definition of the word “use-principal permitted.” **Johnson** read:

*“Use-Principal Permitted. A use which is permitted outright in a district for which a Zoning Permit may be issued by the Zoning Administrator.”*

**Hornik** asked Johnson to read into the record from page I-13 the high-lighted definition of the word “use-special.” **Johnson** read:

*“Use-Special. A use which is permitted in a district only if a permit therefore is expressly authorized by the Planning Board.”*

**Hornik** presented ***Plaintiff’s Exhibit #4*** - Zoning Ordinance Chapter pages II-1 through II-4 of the Randolph County Unified Development Ordinance. **Hornik** asked Johnson if that was a true copy of those pages, and **Johnson** answered yes. **Hornik** asked Johnson to read into record that high-lighted section of page II-1, Article III Jurisdiction. **Johnson** read:

*“This ordinance shall apply to all lands within the areas designated as zoning districts*

*on the official zoning map(s) by the Board of County Commissioners of Randolph County.”*

**Hornik** asked Johnson to read into record from page II-2 Article IV Interpretation of Words and Terms the high-lighted sentence. **Johnson** read:

*“ Except as defined herein, all other words used in this ordinance shall have their customary dictionary definition.”*

**Hornik** asked Johnson what this sentence meant to him. **Johnson** said it means unless the ordinance has a specific definition listed, the ordinary meaning found in the dictionary is used. **Hornik** asked Johnson to read the sentence high-lighted in Section 1 Word and Term Interpretations in this same Article. **Johnson** read:

*“The word ‘building’ includes the word ‘structure’.”*

**Hornik** asked Johnson to read the sentence high-lighted in Section 2 District Boundaries Shown on Zoning Map in Article V Establishment of Districts. **Johnson** read:

*“The zoning map and all the notations, references and amendments thereto, and other information shown thereon are hereby made a part of this ordinance the same as if such information set forth on the map were all fully described and set out herein.”*

**Hornik** presented **Plaintiff’s Exhibit #5** - Table of Permit Uses Section of the Randolph County Unified Development Ordinance, Pages II-36 through II-54. **Hornik** asked Johnson if this was a true copy, and **Johnson** answered yes. **Hornik** asked Johnson to read the high-lighted sentences in Section 4 Table of Permitted Uses. **Johnson** read:

*“Districts in which particular uses are permitted as a Use By Right are indicated by ‘X’. Districts in which particular uses are prohibited are indicated by a blank.”*

**Hornik** asked Johnson what this meant to him. **Johnson** said it should be understood that if an ‘X’ is not beside the use listed and under a zoning district, then the use is not permitted. **Hornik** asked Johnson if and ‘X’ is beside “accessory uses” under the zoning classification RA on the Table of Permitted Uses. **Johnson** answered that he was correct, accessory uses are permitted by right in all districts. **Hornik** asked Johnson how the Planning Staff categorizes McDowell Lumber Company. **Johnson** answered



“Manufacturing, machine tools, chemicals, fertilizer, paving materials, wood products, paper.” **Hornik** asked Johnson if this use was permitted under the zoning classifications LI or RA, **Johnson** answered no. **Hornik** asked Johnson if there has been testimony that McDowell Lumber Company is a sawmill use, and **Johnson** answered yes. **Hornik** asked Johnson if there were two categories of sawmills, and Johnson answered yes. **Hornik** asked if either of the two uses were allowed in the LI or RA zoning classification, and **Johnson** answered that “temporary sawmills, planing mills” are permitted in RA zones. **Hornik** asked Johnson what is temporary. **Johnson** answered he as heard that definition debated, but he has no idea. **Hornik** asked Johnson if McDowell Lumber Company could be considered this “use”. **Johnson** answered no. **Hornik** asked Johnson if for the last 3 or 4 years he had considered McDowell Lumber Company a “non-conforming use.” **Johnson** answered yes, but that the County for many years considered a portion of the property to be correctly zoned. Johnson continued by saying however it was discovered that the industrial portion of the property had been incorrectly identified as LI zoning. **Hornik** asked Johnson if he felt the property was correctly zoned, notwithstanding what the zoning map had indicated for 21 years. **Johnson** answered that it was the County’s interpretation that the property was correctly zoned. **County Attorney Darren Allen** asked Hornik to keep to relevant questioning, and **Hornik** said he felt these questions were relevant. **Hornik** asked Johnson if he considered the property zoned HI even though the zoning maps showed LI, and **Johnson** answered that the intent of the County was to zone the property Industrial to allow operations of the lumber yard.

**Hornik** presented *Plaintiff’s Exhibit #6* - Pages II-119 through II-121 Article XI Non-Conformance of the Randolph County Unified Development Ordinance. **Hornik** asked Johnson if these were accurate copies of these pages, and **Johnson** answered yes. **Hornik** asked Johnson to read Section 1 which is high-lighted. **Johnson** read:

*“Section 1. Purpose and Intent. If, within the districts established by this ordinance, or by amendments that may later be adopted, there exist lots, structures, and use of land and structures which were lawful before this ordinance was passed or amended, but which would be prohibited under the terms of this ordinance, it is the intent of this ordinance to permit these non-conformance to continue until they are removed, but not to encourage their continuance. Such non-conformance are declared by this ordinance to be incompatible with permitted uses in the districts in which they are located.*

*It is further the intent of this ordinance that non-conformance shall not be enlarged upon,*

*expanded or extended, or used as grounds for adding other structures, or uses prohibited elsewhere in the same district.”*

**Hornik** asked Johnson to read from page II-120 Section 3c. Non Conforming Uses of Open Land. **Johnson** read:

*“A non-conforming open use of land shall not be enlarged to cover more than was occupied by that use when it became non-conforming.”*

**Hornik** asked Johnson to read for the record from page II-120 those high-lighted sentences in Section 4. Non-Conforming Uses of Structures. **Johnson** read:

*“This category of non-conformance consists of structures used, at the time of passage of this ordinance, for purposes not permitted in the district in which they are located.*

- a. A non-conforming use of a structure may be changed to a conforming use.*
- b. A non-conforming use of a structure shall not be changed to another non-conforming use.*

*( c. was not read)*

- d. A non-conforming use of a structure shall not be extended or enlarged except into portions of the structure which, at the time the use became non-conforming, were already erected and arranged or designed for such non-conforming use. . . . (the rest of this section was not read.)*

**Hornik** asked Johnson to read for the record from page II-120 those high-lighted sentences in Section 5. Non-Conforming Structures. **Johnson** read:

*“When a lawful structure exists at the effective date of adoption or amendment of this ordinance . . . . ., such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:*

- a. No structure may be enlarged or altered in a way which increases its non-conformity. (The rest of the section was not read.)*

**Hornik** asked Johnson if the Zoning Ordinance was adopted in 1987, and **Johnson** answered yes. **Hornik** stated that a sawmill is not allowed in a RA or LI zoning district. **Johnson** said that is correct. **Hornik** asked if application of Article XI, Section 1 Non-Conformance would come into play with permitting uses at McDowell Lumber Company. **Johnson** answered that the County operated on the assumption that the

property was properly zoned. **Hornik** said but the Zoning Map then and now said LI. **Johnson** explained the Zoning Maps used in 1986 were done in the street using areal maps taken in 1983. **Johnson** said at that time the County didn't have all the mapping technology of today. **Hornik** asked Johnson when he realized the property was not correctly zoned; and **Johnson** answered he couldn't recall exactly when he became aware. **Hornik** asked Johnson what the proper zoning district would be to operate a sawmill; and **Johnson** answered HI. Johnson said he felt the County intended the property to be zoned correctly. Johnson said he felt as long as the operation was maintained within the original area, it was zoned correctly. **Hornik** asked Johnson if he felt the business could continue even though he had found the property was not located in the appropriate zoning district. **Johnson** said he felt the County intended the property to be zoned correctly. **Hornik** asked Johnson if the Zoning Map was part of the Zoning Ordinance, and **Johnson** answered yes. **Hornik** asked Johnson if he had the authority to change the Ordinance, and **Johnson** answered he did not.

**Hornik** asked Johnson to read from page II-120, the high-lighted sentence from Section 3 Non Conforming Uses of Open Land. **Johnson** read:

- c) *A non-conforming open use of land shall not be enlarged to cover more than was occupied by that use when it became non-conforming.*

**Hornik** asked Johnson what this meant to him, and **Johnson** said it means you cannot expand beyond the area of land you are currently using.

**Hornik** asked Johnson to read the high-lighted sentences from page II-120 in Section 4 Non-Conforming Uses of Structures. **Johnson** read:

*"This category of non-conformances consists of structures used, at the time of passage of this ordinance, for purposes not permitted in the district in which they are located.*

- a) *A non-conforming use of a structure may be changed to a conforming use.*
- b) *A non-conforming use of a structure shall not be changed to another non-conforming use.*
- d) *A non-conforming use of a structure shall not be extended or enlarged except into portions of the structure which, at the time the use became non-conforming, were already erected and arranged or designed for such non-conforming use. . . . "*

**Hornik** asked what (a) meant, and **Johnson** answered that it means a structure being

used for something not allowed under its current zoning designation can be changed to a zoning district where the use is allowed. **Hornik** asked Johnson what (b) meant, and Johnson said a structure can't be changed from one non-conforming use to another non-conforming use. **Hornik** asked if the use could only be changed to a use that is permitted on the Table of Permitted Uses, and **Johnson** answered that is correct. **Hornik** asked Johnson what (d) meant to him, and **Johnson** answered that a building can't be extended or enlarged from its original size. **Hornik** said you can't add on to a structure; and **Johnson** said that is correct.

**Hornik** asked Johnson to read for the record the high-lighted sentences from page II-120, Section 5 Non-Conforming Structures. **Johnson** read:

*"When a lawful structure exists at the effective date of adoption or amendment of this ordinance that could not be built under the terms of this ordinance by reason of restrictions on area, lot coverage, height, yards, or other characteristics of the structure or its location on the lot, such structure may be continued so long as it remains otherwise lawful, subject to the following provisions:*

a) *No structure may be enlarged or altered in a way which increases its non-conformity. . . . . "*

**Hornik** asked Johnson what this meant, and **Johnson** answered that the structure can't be enlarged beyond the size it was at the time it was non-conforming.

**Hornik** presented *Plaintiff's Exhibit #7* Areal Map of McDowell Lumber Company. **Hornik** asked Johnson if he had seen this map, and **Johnson** answered yes. **Hornik** asked Johnson who created the map, and **Johnson** answered the County. **Hornik** asked Johnson if he knew what the numbers on the map designated, and Johnson said he wasn't sure. **Hornik** asked Johnson if he remember the correspondence to Mr. Arthurs in 2007, and **Johnson** remembered. Johnson said they were numbers referring to certain structures of Hornik's concern. **Hornik** asked what was #2 on the map, and **Johnson** answered the dust bin. **Hornik** asked Johnson when the dust bin was constructed, and **Johnson** answered that he didn't recall. **Hornik** asked what the red lines on the map indicated, and **Johnson** answered McDowell Lumber Company property lines. **Hornik** asked what the area outlined in gold was, and **Johnson** said the area requested to be rezoned. **Hornik** asked Johnson if the property on the east side of Falling Oak Road is zoned LI, and **Johnson** answered yes. **Hornik** asked Johnson if the property on the west side of Falling Oak Road is zoned RA, and **Johnson** answered yes. **Hornik** asked

Johnson if the area marked by #7 is the pallet making building/warehouse, and **Johnson** answered yes. **Hornik** asked Johnson when the area marked expansion (next to the #7) was constructed, and **Johnson** answered late 2004 and early 2005. **Hornik** asked Johnson if the smaller marked expansion was the pallet dryer, and **Johnson** answered yes. **Hornik** asked Johnson if the construction was complete before McDowell Lumber Company made application for a zoning change, and **Johnson** answered he was not sure. **Hornik** asked Johnson to identify #15, #16, and #10 as indicated on the map, and **Johnson** answered #15 is lumber storage, #16 is the forestry office, and #10 is the crane. **Hornik** asked Johnson if any of these structures were completed prior to McDowell Lumber Company making application for a zoning change, and **Johnson** answered yes. **Hornik** asked Johnson if he remembered McDowell Lumber Company going through the zoning change application process, and **Johnson** answered yes. **Hornik** asked Johnson if he was present at the Planning Board hearings during December 2004 and January 2005, and **Johnson** answered yes. **Hornik** asked Johnson if he was present for the Commissioners' hearings in February 2005 and May 2005, and **Johnson** answered yes. **Hornik** asked Johnson if he was present for the Court hearings, and **Johnson** answered yes. **Hornik** asked Johnson if he remembered the objections his clients expressed during the Planning Board and Board of Commissioners' hearings, **Johnson** answered that he heard them. **Hornik** said that this would be all his questions for Johnson at this moment.

**County Attorney Darren Allen** asked Ben Morgan, Attorney for McDowell Lumber Company, if he would like to cross-examine the witness.

**Morgan** said he wanted to briefly clarify a few points with Johnson. Morgan referred back to ***Plaintiff's Exhibit #6*** and asked Johnson to read for the record the second portion on page II-120 of Section 4(d) Non-Conforming Uses of Structures. **Johnson** read:

*"No structural alterations shall be made in any structure occupied by a non-conforming use, except those required by law or ordinance or ordered by the Zoning Administrator to secure the safety of the structure."*

**Morgan** said that he knew these were definitions and asked Johnson what he thought this section meant. **Johnson** said that if there is a structure in a non-conforming area and it is in bad shape or needs improvement for safety purposes it is permitted. **Morgan** asked Johnson if this would be considered an exception, and **Johnson** answered yes. **Morgan** asked Johnson to read for the record page II-121 (***Plaintiff's Exhibit #6***) Section 6 Repairs and Maintenance. **Johnson** read:

*“On any structure on a non-conforming lot, a structure containing a non-conforming use, or a non-conforming structure, work may be done in any period of twelve (12) consecutive months on ordinary repair or replacement of non-bearing walls, fixtures, wiring, or plumbing, to an extent not exceeding ten percent (10%) of the current replacement value of the buildings, provided that the cubical content of the building as it existed at the time of passage or amendment of this ordinance shall not be increased. Should such building or structure be destroyed by any means to an extent of more than fifty percent (50%) of its replacement cost or bulk, exclusive of foundations and land value, it shall not be reconstructed except in conformity with the provisions of this ordinance.*

*Nothing in this ordinance shall be deemed to prevent the strengthening or restoring to a safe condition of any building or part thereof declared to be unsafe by any county official charged with protecting the public safety, upon order of such official.”*

**Morgan** asked Johnson if this is another exception, and **Johnson** answered yes. **Morgan** asked what this section meant, and Johnson said this allowed for repairs and maintenance of existing buildings, and if a structure is totally destroyed, it gives a percentage that is allowed to be reconstructed. **Morgan** asked Johnson to go back to his earlier testimony. Morgan asked Johnson to talk more about when countywide zoning was adopted on July 6, 1987. Morgan said the adoption of the Zoning Ordinance did not just simply spring up, and **Johnson** said that is correct. **Morgan** asked Johnson to tell him how the Planning Staff determined zoning for each property. **Johnson** said that originally the County was considering zoning in the northern part of Randolph County and during that process the County decided there was support and requests to zone all of Randolph County. Johnson said the County didn't have planning staff to take on such a task and contracted with the Piedmont Trial Council of Government to create the zoning maps. Johnson said the COG was looking at the northern part of the County and using 1982 areal photos. Johnson said the consultants would hand-draw what was visible from the public road and these old photos. Johnson said this County is approximately 793 sq. miles and the consultants tried to classify each parcel by the use that was on the ground at that time. **Morgan** asked Johnson if the consultants visited the McDowell Lumber Company at that time, and **Johnson** said he didn't know for sure. **Morgan** asked Johnson if the County classified a property by the use at that time, and **Johnson** said that is correct. **Morgan** asked Johnson if he felt the zoning classification had been wrongly applied to McDowell Lumber Company. **Johnson** answered yes, because the process

was done manually by people using old photos driving by properties and literally drawing in what they saw with markers. **Morgan** asked Johnson if he felt the consultants drew in LI instead of HI mistakenly, and **Johnson** answered yes. **Morgan** asked Johnson if this was the only site missed - **Hornik** objected to this question - **Johnson** answered no and when these cases were brought to our attention, the County corrected them. **Morgan** asked Johnson if he knew of any other sawmills that were incorrectly zoned or missed during that time - **Hornik** objected to this question - **Johnson** said yes, Ward Sawmill in Seagrove. **Morgan** asked if that case had gone through the process and been corrected, and **Johnson** answered yes. **Morgan** presented a photo *Defendant's Exhibit #1* - a 1987 photograph of McDowell Lumber Company. **Morgan** asked Johnson if he had seen this photo before and **Johnson** answered yes. **Morgan** asked Johnson what the photo was, and **Johnson** said it shows the area of land that was cleared and being used for lumber storage and operation of a sawmill. **Morgan** asked Johnson when the photo was taken, and **Johnson** answered that at the top of the photo it is marked 1987. **Morgan** asked Johnson if he had taken the photo, and **Johnson** answered no. **Morgan** asked Johnson if the operation is located on both sides of Falling Oak Road in this photo, and **Johnson** answered yes. **Morgan** asked Johnson if Falling Oak Road is a public road, and **Johnson** answered yes, State maintained. **Chairman Rains** asked which way is north in the photo, and **Johnson** answered Hwy 49 is north of the site. **Morgan** asked Johnson if he would characterize his letter dated September 12, 2008 to Robert Hornik (*attachment in Plaintiff's Exhibit #1*) his response to the Winslow - McDowell Appeal, and **Johnson** answered yes. **Morgan** asked Johnson if he could summarize his decision in this letter. **Johnson** said that the Board has a copy of this letter and there are six (6) specific areas:

1. **The Dust Bin.** (Paragraphs 1, 2, 4, 5, and 6) *The dust bin in question has been in existence since on or about 2002. Since the matter went before a public hearing on the issue of rezoning, a small structural enclosure was constructed at the concrete base of the dust. The purpose of this enclosure was to insure the environmental control of dust whenever the sawdust is being removed or loaded into truck beds beneath the dust bin. My opinion is that the construction of this dust bin is necessary to comply with state and federal environmental laws and private nuisance law, which - as you know - is not foreign to the circumstances at hand. Therefore, this alteration is authorized by*

Section 4(d).

**Morgan** asked Johnson if it was his understanding that the dust bin had been in existence since 2002, and **Johnson** answered that is correct.

2. **The Crane.** (Paragraph 10, 11) The crane in question was installed in January of 2006 to replace two large diesel-operated Volvo front end tree loaders used for the purpose of conveying logs. Since the crane was mounted on a concrete foundation, a building permit was sought and obtained. Relative to the prior equipment, the crane allows a more efficient, safe, and environmentally-friendly operation: (1) the crane's electrical power replaced diesel power; (2) the crane substantially reduces dust, noise, and emissions; (3) the crane's operation requires less ground area due to the stacking of the logs; (4) the crane reduces water application to the logs by approximately 60%, thereby greatly reducing water and mud run-off; and (5) since the crane is in a fixed position and requires only one operator, it provides greater safety to employees in the logging storage yard. The crane replaced structures or uses already erected, arranged, designed and in-use for a nonconforming use. In addition, my opinion is that the construction of the crane is necessary to comply with private nuisance law, by its environmental effects inuring to the benefit of your clients. Therefore, this structure is authorized by Section 4(d).

**Morgan** asked Johnson about permitting the crane. **Johnson** said that it was his opinion that the crane was necessary to comply with nuisance laws and was a safety benefit to employees and also a benefit to the neighbors. **Morgan** asked Johnson if McDowell Lumber Company was required to get a Building Permit for the crane. **Johnson** answered that it was his understanding that the Building Permit would not



have been necessary if the crane had not required a concrete pad and electrical service.

3. **The Pallet Warehouse Building.** (Paragraphs 7, 8, and 13) *The building in question was permitted in November of 2004, before your clients raised any objection to the proposed rezoning. Therefore, my opinion is that the use of this building is protected as a vested right of the McDowell Lumber Company.*

**Morgan** asked Johnson if the pallet warehouse building was permitted before the 2004 rezoning hearings. **Johnson** answered he felt that the use of this building is protected as a vested right.

4. **The Forestry Office.** (Paragraph 16) *The small, modular forestry office replaced structures or uses already erected, arranged, designed and in-use for a nonconforming use. The forestry office is 18' x 42', and replaced a much larger, more structurally unsound building that was 24' x 45'. Given the condition of the precursor structure, my opinion is that the construction of the forestry office is necessary for structural safety. Therefore, this structure is authorized by Section 4(d).*

**Morgan** asked Johnson if he felt this was an expansion of a non-conforming use. **Johnson** said it was his opinion that this was not an expansion of a non-conforming use to construct a smaller, safer building.

5. **The Storage Sheds.** (Paragraphs 14 and 15) *The sheds in question were permitted in before your clients raised any objection to the proposed rezoning, and, in fact, before the McDowell Lumber Company filed an application for a rezoning. Therefore, my opinion is that the use of these sheds is protected as a vested right of the McDowell Lumber Company*

**Morgan** asked Johnson if non-conforming laws applied to these structures, and **Johnson** said he felt the structures were protected as a vested right.

6. **The Leyland Cypress Buffer.** (Paragraphs 3 and 12) *As you know, the Leyland Cypress trees were included as a condition of the 2005 rezoning of the McDowell Lumber Company property from Residential/Agricultural and Light Industrial to Heavy Industrial- Conditional District. Said rezoning, and its concomitant conditions, were invalidated by the decision of Judge Lamm and by the decision of the Court of Appeals. While Randolph County has encouraged the landowner to continue to nurse these trees for the sake of goodwill and neighborliness, Randolph County is without legal authority to enforce the invalidated conditions of an invalidated conditional district rezoning.*

**Morgan** said buffers have been addressed in this appeal. **Morgan** asked Johnson if he was aware of where these buffers are located, and **Johnson** said next to the Winslow property. **Morgan** asked when the buffers were planted, and **Johnson** answered after the Conditional Rezoning was approved by the County in 2005. **Morgan** asked if these buffers were a condition of that zoning change approval, and **Johnson** answered yes. **Morgan** asked if the July 2006 Court Ruling removed the conditions. **Johnson** answered that it invalidated any conditions placed on the property by the Commissioners during the hearing process. **Johnson** said that the County would not enforce those conditions, those conditions of rezoning were voided by the Court. **Morgan** asked Johnson if he has been to the site since that time, and **Johnson** answered yes. **Morgan** asked if the trees were still there, and **Johnson** answered yes. **Morgan** asked if they were being well maintained, and **Johnson** answered yes, the trees are healthy unlike most Leyland cypress. **Morgan** told the Board he had no further questions for Johnson.

**Hornik** asked for a limited re-direct. **County Attorney Darren Allen** permitted.

**Hornik** asked Johnson if he consulted with anyone when he wrote his letter dated September 12, 2008. **Johnson** answered yes, he consulted with the County Attorney

Darren Allen. **Hornik** asked Johnson if he did any research before writing this letter, and **Johnson** answered yes. **Hornik** asked Johnson what kind of research he did, and **Johnson** said he researched information given to him by McDowell Lumber Company and other background information such as permits issued, etc. **Hornik** asked Johnson if he talked to anyone at McDowell Lumber Company before writing this letter, and **Johnson** answered yes, he spoke with Doug McDowell about the crane. **Hornik** asked Johnson what the purpose of the dust bin was, and **Johnson** said it was his understanding that the dust bin is used to contain dust from the pallet making operation. **Hornik** asked Johnson if he knew there was no crane on-site prior to 2006, and **Johnson** answered that was his understanding. **Hornik** asked Johnson if he considered the crane a structure, and **Johnson** said yes. **Hornik** asked Johnson when the structure was built for pallet making (structure marked #7 on *Plaintiff's Exhibit #7* map), and **Johnson** answered he was not sure. **Hornik** asked Johnson when McDowell Lumber Company filed the application for a zoning change, and **Johnson** answered he was not sure. **Hornik** presented *Plaintiff's Exhibit #8* - copy of McDowell Lumber Company Zoning Change Application. **Hornik** asked Johnson if he had seen this application, and **Johnson** answered yes. **Hornik** asked Johnson if the filing date of the application was October 28, 2004, and **Johnson** answered that is correct. **Hornik** told Johnson that he had claimed that this zoning change request was to correct the error on the zoning map, and **Johnson** said that is correct. **Hornik** said that Johnson's investigation tells us that permits for the pallet making operation were issued on November 2004, after the zoning change application was filed. **Hornik** said that we also know that the wood manufacturing use and sawmill operation is not allow in a LI zoning district. **Hornik** asked Johnson if this statement was correct, and **Johnson** answered that is correct. **Hornik** said in November 2004 the property had not been zoned for this type of operation, and **Johnson** said that is correct. **Hornik** asked Johnson what the forestry office was permitted for, and **Johnson** said there had been a forestry office there and because of structure problems it was replaced with a smaller building for the same use. **Hornik** asked Johnson what happens in the forestry office, and **Johnson** said that he was not sure. **Hornik** asked Johnson what happened to the existing building, and **Johnson** answered that it was torn down because it was not safe. **Hornik** asked if a County Official had determined that the structure was not safe, and **Johnson** answered no. **Hornik** asked if the County had condemned the building, and **Johnson** answered no. **Hornik** said so it was hear say that the building was not safe, and **Johnson** said that was correct. **Hornik** asked Johnson if he knew what the Ordinance says in Article XI Non-Conformance, Section 6 Repairs and Maintenance. **Johnson** said that he looked at the request as the office would be a smaller building. **Hornik** asked Johnson if the Ordinance allows him to permit this building, and **Johnson** said yes if the approval is to

replace the existing unsafe structure with a smaller, safer building. **Morgan** objected and said the question has been asked and answered. **Hornik** asked Johnson how long the storage sheds had been on the site, and **Johnson** answered they have been there for many years. **Hornik** asked Johnson if he knew how many years, and **Johnson** answered no. **Hornik** asked Johnson if he had ever seen the building permit applications for any of the structures, and **Johnson** answered that he had not looked at any of the building permits. **Hornik** ended his questioning of Johnson.

**County Attorney Darren Allen** asked Morgan if he would like the opportunity to redirect, and **Morgan** answered no.

**Hornik called Tony McDowell, owner of McDowell Lumber Company, as his next witness.**

**Hornik** showed *Plaintiff's Exhibit #8* to Tony McDowell and asked him if he had seen this application, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if the signature on the application was his, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if the application was dated October 28, 2004, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell what was the purpose for filing this application, and **Tony McDowell** said he felt the County made a mistake and he was trying to straighten it out. **Hornik** asked Tony McDowell if he had any conversations with County Zoning Officials, and **Tony McDowell** answered yes, Randle Brim. **Hornik** asked Tony McDowell how far back did these conversations begin, and **Tony McDowell** said he was not sure. **Hornik** asked Tony McDowell if he had talked with Johnson, and **Tony McDowell** said he was not sure. **Hornik** asked Tony McDowell if he couldn't recall now, and **Tony McDowell** answered no. **Hornik** showed Tony McDowell *Plaintiff's Exhibit #7* and asked Tony McDowell if he recognized the areal photo, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell what it was, and **Tony McDowell** said it was an areal photo of McDowell Lumber Company. **Hornik** asked Tony McDowell what the #1 and #2 represented on the map, and **Tony McDowell** said they are the dust bin. **Hornik** asked Tony McDowell what purpose does the dust bin serve, and **Tony McDowell** explained that they operate two (2) saws inside the building and they blow dust into the bin from the pallet making operations. **Hornik** asked Tony McDowell how long the dust bin had been there, and **Tony McDowell** answered since September 2002. **Hornik** asked Tony McDowell if the pallet making operation had expanded since Labor Day of 2002, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell to describe the expansion. **Tony McDowell** said in 2003 there were

Environmental Laws put in place by the Federal Government to sterilize these pallets because of bugs and worms that had gotten into pallets built in other countries. Tony McDowell said that these pallets were being sent into the USA and the bugs and worms from those pallets killed thousands of trees in the USA. Tony McDowell said that due to this change in the law they had to build a new warehouse and sterilize the pallets.

**Hornik** said that the building between #7 and #15 (on *Plaintiff's Exhibit #7*) had two (2) shades of roof. **Hornik** asked Tony McDowell why, and **Tony McDowell** answered that the part near #7 was built at the end of 2002 or the first part of 2003 and the portion beneath #15 was built in 1977. **Hornik** asked about the section at #7, and **Tony McDowell** answered it was constructed the last of 2004 and finished in early 2005.

**Hornik** presented *Plaintiff's Exhibit #9* - County Zoning Permit and Building Permit both date November 8, 2004, and County Electrical Permit date November 14, 2004. **Hornik** asked Tony McDowell if he had ever seen the documents, and **Tony McDowell** said he probably had, but he was not sure. **Hornik** asked Tony McDowell what the permits were for, and **Tony McDowell** said he was not sure. **Hornik** identified the documents as permits for a 50' x 80' addition issued in November 2004. **Hornik** asked Tony McDowell if he now knew what building the permits refer to, and **Tony McDowell** said he was not sure, unless they were for the building below #7 on the map. **Hornik** told Tony McDowell he wanted to show him something else.

**Hornik** presented *Plaintiff's Exhibit #10* - County Zoning Permit dated November 18, 2004. **Hornik** asked Tony McDowell if he had seen this document, and **Tony McDowell** said probably so. **Hornik** asked what the 114' x 70' addition was for, and **Tony McDowell** said he was not sure. **Hornik** asked Tony McDowell if the Zoning Permit showed the Zoning District as LI, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if the date on the Permit was November 18, 2004, and **Tony McDowell** answered yes. **Hornik** presented *Plaintiff's Exhibit #11* - County Building Permit dated November 18, 2004. **Hornik** asked Tony McDowell if this Building Permit relates to the same building as *Plaintiff's Exhibit #10* Zoning Permit, and **Tony McDowell** answered that is correct. **Hornik** asked if the Building Permit was dated November 18, 2004, and **Tony McDowell** answered that is correct. **Hornik** asked Tony McDowell if he knew the dimensions of the pallet making building, and **Tony McDowell** said not right off.

**Hornik** presented *Plaintiff's Exhibit #12* - Zoning Permit dated December 1, 2004, Building Permit dated December 1, 2004, and Certificate of Compliance dated December 29, 2005. **Hornik** asked Tony McDowell what the construction permits were for, and

**Tony McDowell** said he didn't know. **Tony McDowell** said it may be the pallet sterilizer building. **Hornik** asked if the 20' x 40' kiln building was the sterilizer, and **Tony McDowell** said that is correct. **Hornik** asked Tony McDowell the date of the Zoning Permit, and **Tony McDowell** answered December 1, 2004. **Hornik** asked Tony McDowell what the sterilizer was for, and Tony McDowell said it is to heat up the pallets and kill any eggs of bugs or worms that may be on the wood. **Hornik** said the pallet making building didn't exist before December 2004, and **Tony McDowell** said that is correct. Tony McDowell said that they had cut pallets for many years, but they didn't nail them together.

**Hornik** presented *Plaintiff's Exhibit #13* - County Zoning Permit dated January 30, 2006, Building Permit dated January 30, 2006, Electrical Permit dated January 30, 2006, and Certificate of Compliance dated February 7, 2006. **Hornik** asked Tony McDowell if he had seen these documents, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if the Zoning Permit was to place a crane on the property and the permit had been okayed by REB, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if he had put the crane on the property, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell when he placed the crane on the property, and **Tony McDowell** answered he guessed some time after January 30, 2006. **Hornik** asked Tony McDowell to identify on the map (*Plaintiff's Exhibit #7*) the location of the crane, and **Tony McDowell** identified the area represented by #10. **Hornik** asked Tony McDowell if there was any crane on the property prior to that date, and **Tony McDowell** answered no. **Hornik** asked Tony McDowell if the crane was a new addition to the property, and **Tony McDowell** answered that is correct. **Hornik** asked Tony McDowell if he had any idea how much it cost McDowell Lumber Company to place the crane on the property, and **McDowell** said not exactly but it was around 6 or 7 hundred thousand dollars. **Hornik** asked Tony McDowell how much the pallet making operation cost McDowell Lumber Company, and **Tony McDowell** said he had no idea. **Hornik** asked Tony McDowell how tall the crane was, and **Tony McDowell** said he didn't know. **Hornik** asked if the crane was pretty big, and **Tony McDowell** answered that it is standard size for the job and has a 125' circle radius. **Hornik** asked again if the crane was pretty big, and **Tony McDowell** answered no he thought it was small or medium for the job it does. **Hornik** asked **Tony McDowell** what the crane was used for, and **Tony McDowell** said it is used to stack lumber, unload trucks, and sprinkle the logs. Tony McDowell said that before they got the crane, they used front-end loaders. **Hornik** asked Tony McDowell if the purpose of the crane was to replace the loaders, and **Tony McDowell** answered yes and to keep the logs wet. Tony McDowell said that they used to use sprinklers, but the

crane makes this process more efficient, easier, and safer. Tony McDowell said they are using less sprinklers and less area now. **Hornik** asked other than the expansion of the buildings of the pallet making operations and the crane, have any other changes being made to their operation. **Tony McDowell** said the forestry office that has already been talked about and quite a bit of paving to cut down on the dust. **Hornik** asked Tony McDowell if the paving was done around the expanded operation, and **Tony McDowell** answered yes. **Hornik** said that there is a second pallet making site on the property, and **Tony McDowell** said that they have a place where they cut down used pallets. **Hornik** said that they were not doing this in 2004, and **Tony McDowell** said that is correct, they have bought a saw to cut the boards off. **Hornik** asked Tony McDowell to show the location of this operation, and **Tony McDowell** marked an extra map with a “P” on an existing building (just above ‘Falling’ in the road name on the map). **Hornik** asked Tony McDowell how much the saw cost McDowell Lumber Company, and **Tony McDowell** answered approximately \$12,000. **Hornik** asked Tony McDowell if they constructed a new building for this operation or are they using an existing building, and **Tony McDowell** answered an existing building. **Hornik** asked if they put a new roof on the building, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if they made any other changes to their operation, and **Tony McDowell** said they tore down a building for the new chipper. **Hornik** asked Tony McDowell to mark the map with the location of the chipper operation. **Tony McDowell** marked an area with a “C” approximately in the center of the lumber company’s operation south of Falling Oak Road. **Hornik** asked Tony McDowell to describe the function of this new chipper operation, and **Tony McDowell** answered that this is not a new chipper operation. Tony McDowell said that the vibrator to the chipper was worn out and had discharged from the top of the machine. Tony McDowell said when they changed the vibrator, they installed a bottom vibrator to eliminate one of the cyclones. **Hornik** asked Tony McDowell if he had to construct a new building for this new chipper vibrator, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if he had to dig new footings for this building, and **Tony McDowell** answered no, they had to make some kind of basement in the existing foundation for the new vibrator. **Hornik** asked Tony McDowell when this was done, and **Tony McDowell** answered last Christmas. **Hornik** asked Tony McDowell if there had been any other changes at McDowell Lumber Company since November 2004, and **Tony McDowell** said he was not sure. **Hornik** asked Tony McDowell if he placed a new crane on the property (indicated on the map by the #10) in 2006, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if the new chipper (indicated on extra map as “C”) was placed on the property in 2007, and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if the area marked “P” was used for pallet recycling,

and **Tony McDowell** answered yes. **Hornik** asked Tony McDowell if the pallet making operation (indicated on the map as #15) was started in 2002, and **Tony McDowell** answered that is correct. **Hornik** asked Tony McDowell if the building indicated on the map by “X” was where the new roof addition was made in late 2002, and **Tony McDowell** said that is correct. **Hornik** asked Tony McDowell when the building indicated on the map by “O” was added and **Tony McDowell** said at the same time as the roof addition. **Hornik** asked Tony McDowell when the warehouse, dryer building, and dust bin were built, and **Tony McDowell** said he was not exactly sure. **Hornik** asked if they were constructed after the cyclones appeared in September 2002, and **Tony McDowell** answered that is correct. **Hornik** asked Tony McDowell if both the cyclones were built at the same time, and **Tony McDowell** answered no, one was built in late 2002. **Hornik** asked Tony McDowell if the second cyclone was constructed around the time of the sterilizer building, and **Tony McDowell** said he was not sure. **Hornik** asked Tony McDowell when the enclosure was constructed around the cyclone, and **Tony McDowell** answered after November 2004. **Tony McDowell** said the enclosure was built to try to enclose the dust. **Hornik** asked Tony McDowell to describe the purpose of the cyclones and the dust bin. **Tony McDowell** answered that the two saws in the pallet making operation create dust which is stored in the dust bins. Tony McDowell said that the enclosure is to try to eliminate the dust. Tony McDowell said pallet making operation fans push dust into the cyclones and then the dust drops to the dust bin. Tony McDowell said trucks back into the enclosed area and the dust is removed. **Hornik** asked if the building was used for any other purpose before the pallet making operation, and **Tony McDowell** answered the main planer was located there from 1977 until 2002 and it became a back-up planer at that time. Tony McDowell said they put another planing operation in the facility and at times they had to run both of the planers at the same time. Tony McDowell said as time went on they used this planer less.

**County Attorney Darren Allen** asked Morgan if he would like to cross-examine the witness.

**Morgan** asked Tony McDowell when McDowell Lumber Company started the pallet making operation, and **Tony McDowell** answered he wasn’t exactly sure but probably some time in 2002. **Morgan** asked if it was prior to 2004, and **Tony McDowell** answered yes. **Morgan** asked Tony McDowell how long his family had owned the property, and **Tony McDowell** said it was purchased by his father in 1954. **Morgan** asked Tony McDowell what his father did with this property. **Tony McDowell** said he was only six (6) months old at the time and his family moved into the old yellow house.



Tony McDowell said his father has always had a sawmill business here. Tony McDowell said he remembers lumber stacked here as early as the mid to late 1960's. **Morgan** asked Tony McDowell how long Falling Oak Road has been there, and **Tony McDowell** said as long as he could remember. **Morgan** asked Tony McDowell if the sawmill operation was on both sides of the road during his lifetime, and **Tony McDowell** answered yes. **Morgan** said he had no more questions at this time.

**Hornik called his next witness, Claude Winslow, adjoining property owner.**

**Hornik** asked Winslow if he realized he was under oath, and **Winslow** answered yes. **Hornik** showed Winslow the map known as *Plaintiff's Exhibit #7* and asked Winslow to mark his residence. **Winslow** marked the property "Winslow" (on the extra map). **Hornik** asked Winslow how long he had owned the property, and **Winslow** answered since 1972. **Hornik** asked Winslow how long the property had been owned by his family, and **Winslow** answered since 1947. **Hornik** asked Winslow where he lived prior to 1972, and **Winslow** answered in the little grey house on the property just north of the #2 on the map. **Hornik** asked Winslow what was the use of the McDowell Lumber Company property in 1972, and **Winslow** answered there was no lumber company at that time, just a cow pasture. **Hornik** asked Winslow if there was a lumber company here for 50+ years, and **Winslow** answered not that he could recall. **Hornik** asked Winslow if he knows what the property looks like today, and **Winslow** answered yes. **Hornik** asked Winslow if changes had been made over the years, and **Winslow** answered yes. **Hornik** asked Winslow to describe the changes made to the property beginning in 2004 to the present. **Winslow** said there was an existing building with a planer and the building next to that may have been there, but the warehouse building and the sterilizer building was not there. **Hornik** asked Winslow when the warehouse and sterilizer buildings were constructed, and **Winslow** said that construction started sometime in November or December of 2004 and continued through the first part of 2005. **Hornik** presented *Plaintiff's Exhibit #14* (photo of the pallet storage building) and asked Winslow to look at the photo. **Hornik** asked Winslow what was in the photo, and **Winslow** answered the pallet storage building and the area cleared off for the dryer building to be built. **Hornik** asked Winslow when the photo was taken, and **Winslow** answered in late 2004 or early 2005. **Hornik** presented *Plaintiff's Exhibit #15* (photo of pallet making operation and dust collector) and asked Winslow when the photo was taken, and **Winslow** said it was taken in January 2005. **Hornik** asked Winslow if he took the photo, and **Winslow** answered yes. **Hornik** asked if the photo was a fair reflect of the property at that time, and **Winslow** answered yes. **Hornik** present *Plaintiff's Exhibit #16* (photo of the dust

bin) and asked Winslow when the photo was taken. **Winslow** said he took the photo in 2005. **Hornik** presented *Plaintiff's Exhibit #17* (photo of the dust bin) and asked Winslow to describe the photo. **Winslow** said that this is the same site (dust bin) as the building in *Plaintiff's Exhibit #16* where they were beginning to build the dust enclosure in November 2004. **Hornik** asked Winslow if he took this photo, and **Winslow** answered yes. **Hornik** asked if the photo was an accurate reflection of what he saw, and **Winslow** answered yes. **Hornik** asked Winslow to indicate on the map known as *Plaintiff's Exhibit #7* where this is located, and **Winslow** said really this is in the area of #1 and #2, north of the storage shed. **Hornik** presented *Plaintiff's Exhibit #18* and asked Winslow to describe what is in this photo. **Winslow** said this is the same building as the pallet making operation but it doesn't show the last storage building that was constructed. Winslow said you can see the grading in the photo where the building was to be built. **Hornik** asked if the warehouse was in the photo, and **Winslow** answered no. **Hornik** asked Winslow the date of this photo, and **Winslow** answered November 25, 2004. **Hornik** presented *Plaintiff's Exhibit #19* and asked Winslow to describe the photo. **Winslow** said this is the framework of the last storage building constructed. **Hornik** asked Winslow if this is marked #7 on *Plaintiff's Exhibit #7*, and **Winslow** answered yes. **Hornik** asked Winslow the date of this photo, and **Winslow** answered January 29, 2005. **Hornik** asked Winslow if he took this photo, and **Winslow** answered yes. **Hornik** asked Winslow if this was a fair and accurate account of what he saw, and **Winslow** answered yes. **Hornik** presented *Plaintiff's Exhibit #20* and asked Winslow to describe the photo. **Winslow** said that this is the same photo as *Plaintiff's Exhibit #19* only from a different angle. **Hornik** asked Winslow if this was a fair and accurate account of what he saw on that date, and **Winslow** answered yes. **Hornik** presented *Plaintiff's Exhibit #21* and asked Winslow to describe this photo. **Winslow** said this was also the same photo as *Plaintiff's Exhibit #19* only from a different angle. **Hornik** asked Winslow if in the left foreground was there ground work started for the sterilizer building, and **Winslow** answered yes. **Hornik** asked Winslow if the photo showed in the right foreground the beginning of the storage building, and **Winslow** answered yes. **Hornik** asked Winslow the date of the photos, and **Winslow** answered January 29, 2005. **Hornik** asked Winslow if he took the photos, and **Winslow** answered yes. **Hornik** asked Winslow if the photos taken were a fair and accurate account of what he saw, and **Winslow** answered yes. **Hornik** presented *Plaintiff's Exhibit #22* and asked Winslow to describe the photo. **Winslow** said this is the same area only from a different angle. **Hornik** asked Winslow if he could see one cyclone, and **Winslow** answered that is correct. **Hornik** asked Winslow what was the date of the photo, and **Winslow** answered January 29, 2004. **Hornik** asked Winslow if the photo was a fair and accurate account of what he saw, and

**Winslow** answered yes. **Hornik** presented *Plaintiff's Exhibit #23* and asked Winslow to describe the photo. **Winslow** said it the same photo as *Plaintiff's Exhibit #22* except the sterilizer building has been added along with another cyclone and the warehouse building. **Hornik** asked Winslow if he took this photo when he was at the site with him in November 2007, and **Winslow** answered yes. **Hornik** asked Winslow if the photo was a fair and accurate account of what he saw, and **Winslow** answered yes. **Hornik** presented *Plaintiff's Exhibit #24* and asked Winslow to describe the photo. **Winslow** said that it shows lumber storage from his (Winslow) property with the dust collector pipe in the middle of the photo. **Hornik** asked Winslow if that is what he saw from the southern end of the lumber company, and Winslow answered yes. **Hornik** asked Winslow the date of the photo, and **Winslow** answered November 28, 2004. **Hornik** presented *Plaintiff's Exhibit #25* and asked Winslow to describe the photo. **Winslow** said it is the crane used to unload logs. **Hornik** asked Winslow if he had seen this crane before, and **Winslow** answered yes. **Hornik** asked Winslow if the crane is on the McDowell Lumber Company property, and **Winslow** answered yes. **Hornik** asked Winslow where on the property the crane is located, and **Winslow** said to the south at the far end of the lumber company property on the right-hand side of Falling Oak Road. **Hornik** showed Winslow *Plaintiff's Exhibit #7* and asked Winslow to locate the crane on the map. **Winslow** indicated the crane was located where the map is marked by the #10. **Hornik** asked Winslow when the crane first appeared on the property, and **Winslow** said in 2006. **Hornik** asked Winslow if there was ever a crane on the property prior to that time, and **Winslow** answered no. **Hornik** asked Winslow if he had always lived here, and **Winslow** answered yes. **Hornik** asked Winslow if there were any other changes he was aware of since the zoning change application for was filed in October 2004. **Winslow** described the property changes as the crane, the dryer/sterilizer operation, one storage building, another storage building started, and one additional cyclone. **Hornik** asked Winslow if there were any changes or additions to the property after the rezoning process, and **Winslow** answered yes. **Hornik** asked Winslow if he was present at the meetings during the rezoning process, and **Winslow** answered yes. **Hornik** asked Winslow if he spoke at the meetings and expressed his concerns, and **Winslow** answered yes. **Hornik** asked Winslow if he expressed concern that the operation was, in his opinion, not allowed under the current zoning, and **Winslow** answered yes. **Hornik** asked Winslow if he opposed the request for the zoning change to HI, and **Winslow** answered yes. **Hornik** said he had no further questions at this time.

**County Attorney Darren Allen** asked Morgan if he would like to cross-examine the witness.

**Morgan** asked Winslow if he had lived here his entire life, and **Winslow** answered yes. **Morgan** asked Winslow if he had lived in his existing residence since the 1970's, and **Winslow** answered yes. **Morgan** asked Winslow if he lived in the adjacent house prior to that time, and **Winslow** answered that is where he grew up. **Morgan** said so you know the history of the property, and **Winslow** answered yes. **Morgan** showed Winslow *Defendant's Exhibit #1* and asked Winslow if he recognized this photo dated 1987, and **Winslow** answered yes. **Morgan** asked Winslow if he had any memory of McDowell Lumber Company in 1987, and **Winslow** answered no he didn't. **Morgan** asked Winslow if he could remember a cow pasture before then, and **Winslow** said yes he did. **Morgan** asked Winslow what he could remember about the property in 1987, and **Winslow** said that there was a portable sawmill on the other side of the road. **Morgan** asked Winslow if this photo was taken in 1987, and **Winslow** said he didn't know. **Morgan** asked Winslow if the photo showed structures on the east side of the road, and **Winslow** answered yes. **Morgan** asked Winslow if there were buildings on the west side of the road in the photo, and **Winslow** answered yes. **Morgan** asked Winslow if there was an old planer building on the property prior to 1978 or 1977 and a portable sawmill on the east side of the road prior to 1978, and **Winslow** said that he had no idea when the structures were built. **Morgan** asked Winslow why some of the photos presented into evidence had dates and others did not. **Winslow** answered the photos were taken with different cameras. Winslow said the photos taken with dates were taken with his daughter's camera and the photos taken without dates were taken with Hornik's camera. **Morgan** asked Winslow if he asked permission to go on the lumber company property, and **Winslow** answered no. **Morgan** asked Winslow if anyone try to run him off the property, and **Winslow** answered no. **Morgan** asked Winslow if he registered with anyone when entering the property, and **Winslow** answered no. **Morgan** asked Winslow if there was a sign at McDowell Lumber Company that ask visitors to check-in at the office for safety purposes, and **Winslow** said he didn't know. *Hornik objected to this questioning.* **Winslow** said that none of the pictures were taken from McDowell Lumber Company Property. **Morgan** asked Winslow when he was last on Falling Oak Road, and **Winslow** answered not since the last time he saw him there. **Morgan** presented *Defendant's Exhibit #2* areal photo of McDowell Lumber Company in 1989. Morgan said this photo shows McDowell Lumber Company, the Winslow home, and structures on both sides of Falling Oak Road. Morgan asked Winslow if this statement was correct, and **Winslow** answered that is correct. **Morgan** asked Winslow when all these structures were built, and **Winslow** answered he had no idea. **Morgan** presented *Defendant's Exhibit #3* a photo of the same area as that show in the photo known as *Defendant's*

**Exhibit #2** taken at a later date. **Morgan** said the photo is marked with the date 2004, and **Winslow** said he didn't know when it was taken. **Morgan** asked Winslow if McDowell Lumber Company had ever been out of business, and **Winslow** answered not to his knowledge. **Morgan** asked Winslow if the operations had continued since the business first started, and **Winslow** answered to his knowledge. **Morgan** said he had nothing further for Winslow.

**County Attorney Darren Allen** asked Hornik how longer he needed, and **Hornik** answered he had two (2) more witnesses.

*The Board took a 5 minutes break at 8:59 p.m. The Chairman called the meeting back to Order at 9:04 p.m.*

**Hornik called his next witness, Maxton McDowell, adjoining property owner.**

**Hornik** asked Maxton McDowell if he owned property in the vicinity of McDowell Lumber Company, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell to describe where his property is located, and **Maxton McDowell** said that he owns property adjoining McDowell Lumber Company to the west. **Hornik** asked Maxton McDowell if he owned more property in the area, and **Maxton McDowell** answered yes, much more. **Hornik** asked Maxton McDowell where his residence is located, and **Maxton McDowell** answered on the west side of McDowell Lumber Company (across the street). **Hornik** asked Maxton McDowell how long he has lived here, and **Maxton McDowell** answered since 1977. **Hornik** asked Maxton McDowell if the lumber company was here in 1977, and **Maxton McDowell** answered it was not there as it exists today. **Hornik** asked Maxton McDowell what was there, and **Maxton McDowell** answered it was a pasture. **Hornik** asked Maxton McDowell when the first lumber company existed here, and **Maxton McDowell** answered approximately 1978. **Hornik** asked Maxton McDowell to describe the operation in 1978, and **Maxton McDowell** answered that on the east side of the road there was basically only a temporary sawmill operation. **Hornik** asked Maxton McDowell if he knew when McDowell Lumber Company made application to rezoning the property, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell when, and **Maxton McDowell** answered October 2004. **Hornik** asked Maxton McDowell if he was familiar with the County Zoning Ordinance, and **Maxton McDowell** answered yes. **Hornik** asked McDowell for the record to explain his bases of familiarity, and **Maxton**

**McDowell** answered his association with the Planning Board was serving as a Board member from 1988 to 2005, and he was chairman for approximately 8 years. **Hornik** asked Maxton McDowell if he was familiar with the Zoning Ordinance, the Zoning Map, the Table of Permitted Uses, and Non-Conformances. **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell if he heard earlier testimony of Hal Johnson testifying that McDowell Lumber Company was mislabeled during the original zoning process, and **Maxton McDowell** answered he heard. **Hornik** asked Maxton McDowell if he ever recalled, as a Planning Board member, this problem been expressed, and **Maxton McDowell** answered no. **Hornik** asked Maxton McDowell when was the first time he heard that expression of the zoning classification for McDowell Lumber Company, and **Maxton McDowell** answered basically at the first hearing. **Hornik** asked Maxton McDowell if that was at the first Planning Board meeting, and **Maxton McDowell** answered that he didn't remember. **Hornik** asked Maxton McDowell if it was in connection with the zoning change application filed by McDowell Lumber Company, and **Maxton McDowell** answered yes it was. **Hornik** asked Maxton McDowell if at any time prior to that application process had he heard anything about a problem with the zoning classification of McDowell Lumber Company, and **Maxton McDowell** answered no. **Hornik** asked Maxton McDowell to describe what existed on the property prior to the filing date, October 2004, of the zoning change application. **Maxton McDowell** answered there was a sawmill operation, a planer, and to a certain degree pallet making operations on the property. **Hornik** showed Maxton McDowell the *Plaintiff's Exhibit #7* map and asked if he had heard of the additions being described as #1, #2, and #17, and **Maxton McDowell** answered that he would agree with Winslow's testimony. **Hornik** asked Maxton McDowell if he could see the crane from his property, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell how long the crane had been on the McDowell Lumber Company property, and **Maxton McDowell** answered since 2006. **Hornik** asked Maxton McDowell if there had been any other improvements to the property, and **Maxton McDowell** answered there has been the addition to the chipper facility of the sawmill. **Hornik** presented *Plaintiff's Exhibit #26* a photo of the chipper facility being built. **Hornik** asked Maxton McDowell if he took this photo, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell what the date of the picture was, and **Maxton McDowell** answered January 2008. **Hornik** asked Maxton McDowell if this was a fair and accurate account of what he saw at that time, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell to describe the photo, and **Maxton McDowell** said the photo shows construction of a new roof and equipment. **Hornik** asked Maxton McDowell why he took the photo, and **Maxton McDowell** answered because he could see they were expanding the facility. **Hornik** asked Maxton

McDowell how he knew they were expanding, and **Maxton McDowell** answered that he could see vehicles delivering concrete, building materials, and equipment. **Hornik** presented *Plaintiff's Exhibit #27* a photo of the chipper area. **Hornik** asked Maxton McDowell to describe the photo. **Maxton McDowell** said that the photo is a more completed version of the area renovated for the chipper. **Hornik** asked Maxton McDowell if the building in the photo was the same building in *Plaintiff's Exhibit #26*, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell what was the date of the photo, and **Maxton McDowell** answered approximately February or March of 2008. **Hornik** asked Maxton McDowell if this was a fair and accurate account of what he saw at that time, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell to indicate on the map *Plaintiff's Exhibit #7* where this building is located, and **Maxton McDowell** (from the extra map) indicated the building marked "C". **Hornik** asked Maxton McDowell if this was the updated chipper building, and **Maxton McDowell** answered that is correct. **Hornik** presented *Plaintiff's Exhibit #28* a copy of the Randolph County Tax Department Listing Form for 2006. **Hornik** asked Maxton McDowell where this form came from, and **Maxton McDowell** answered the Randolph County Tax Department. **Hornik** asked Maxton McDowell when he got this copy of this form, and **Maxton McDowell** answered yesterday. **Hornik** asked Maxton McDowell if he has looked at the document, and **Maxton McDowell** answered yes. **Hornik** asked what the document said, and **Maxton McDowell** answered that it shows that a lot of equipment was added to McDowell Lumber Company in 2005 and also in 2004. **Hornik** asked Maxton McDowell if this is a listing form for McDowell Lumber Company, and **Maxton McDowell** answered that is correct. **Hornik** asked what the value of equipment added in 2005 totaled, and **Maxton McDowell** answered \$1,322,696. **Hornik** asked what else the form listed. *Morgan objected to this questioning.* **Maxton McDowell** answered that it lists Tony McDowell as the contact person for the business. Maxton McDowell said it also lists property improvements of a resaw building with a new construction cost of \$102,571 and a pallet shop building with a construction cost of \$90,360. **Hornik** asked when the form showed the construction took place, and **Maxton McDowell** answered that it didn't indicate a date, but it would have to be prior to 2008. **Hornik** presented *Plaintiff's Exhibit #29* a copy of the Randolph County Tax Department Business Listing form for 2007. **Hornik** asked Maxton McDowell when he obtained this form, and **Maxton McDowell** answered yesterday. **Hornik** asked Maxton McDowell where this form came from, and **Maxton McDowell** answered the Randolph County Tax Department. **Hornik** asked Maxton McDowell if additional equipment was listed on *Plaintiff's Exhibit #29*, and **Maxton McDowell** answered that there was additional equipment purchased by McDowell Lumber Company in the amount of

\$1,049,029. **Morgan** objected to this questioning. **Hornik** asked McDowell what was the difference between **Plaintiff's Exhibit #28** and **Plaintiff's Exhibit #29**, and **Maxton McDowell** answered the forms are for different years. **Hornik** asked Maxton McDowell if there were any improvements to the property during that year, and **Maxton McDowell** answered that there were different detail items, one being the log crane. **Hornik** asked if the form indicated these items were located on McDowell Lumber Company's property in 2006, and **Maxton McDowell** answered that is correct. **Hornik** asked Maxton McDowell if he was Chairman of the Randolph County Planning Board in 2004 and 2005. **Maxton McDowell** answered that he was Chairman during 2004 and removed as Chairman in January 2005. **Hornik** asked Maxton McDowell if he participated at all in the rezoning application process, and **Maxton McDowell** answered no. **Hornik** asked Maxton McDowell why he didn't participate, and **Maxton McDowell** said he recused himself from the proceedings. **Hornik** asked Maxton McDowell if he expressed any opposition to the zoning change request, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell what was his opposition to the request, and **Maxton McDowell** answered that the request was for HI zoning and he knew that this was an improper zoning. **Hornik** asked Maxton McDowell if he talked with the County Commissioners or the Planning Staff, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell who he talked with, and **Maxton McDowell** said that he spoke several times to Hal Johnson. Maxton McDowell explained that he sat beside Johnson many times as Chairman of the Planning Board. Maxton McDowell said that before and after meetings he expressed concern about the expansions McDowell Lumber Company was making. Maxton McDowell said he also talked to Randle Brim, Code Enforcement Officer, several times about the expansion and several other things. **Hornik** asked Maxton McDowell if he ever received any information from Johnson or Brim, and **Maxton McDowell** answered that they always told him the lumber company was "grandfathered-in" and nothing could be done about it. **Hornik** asked Maxton McDowell if he ever did anything about it, and **Maxton McDowell** answered no, he didn't know there was anything that could be done about it officially until the rezoning request came to the Board. **Hornik** asked Maxton McDowell how the property was zoned at the time, and **Maxton McDowell** said that one side of Falling Oak Road was zoned LI and the other side was zoned RA. **Hornik** asked Maxton McDowell if he realized that the use of the property was not permitted by the Table of Permitted Uses in the Zoning Ordinance, and **Maxton McDowell** answered yes. **Hornik** asked Maxton McDowell if he knew or understood the property to have a non-conforming status, and **Maxton McDowell** answered no. **Hornik** asked Maxton McDowell if any mislabeling of the official zoning map had been expressed to him as Chairman, and **Maxton McDowell** answered no.



**Hornik** said he had no further questions for Maxton McDowell at this time.

**County Attorney Darren Allen** asked Morgan if he would like to cross-examine the witness.

**Morgan** told Maxton McDowell that he wanted to clarify his communication as a Planning Board member with the Planning Staff. **Morgan** asked Maxton McDowell if Johnson told him that McDowell Lumber Company was “grandfathered,” and **Maxton McDowell** answered yes. **Morgan** asked Maxton McDowell when Johnson told him this, and **Maxton McDowell** said he could not recall, but probably some time in the late 1990's or early 2000's. **Morgan** told Maxton McDowell that he indicated in earlier testimony that the first time he heard the property was improperly zoned was during the rezoning request process, and **Maxton McDowell** said that it would have to have been before the County Commissioner hearings, so now that he has thought about it, it must have been January 2005. **Morgan** asked if this would have been because the operation was “grandfathered,” and **Maxton McDowell** answered no. Maxton McDowell said that “grandfathered” would mean that the property use was there prior to 1987, and you can’t do anything about it. Maxton McDowell said this is the law, and **Morgan** said he didn’t think that to be true. **Morgan** asked Maxton McDowell what was on the property in 1987, and **Maxton McDowell** answered that there was a sawmill and planing operation. **Morgan** asked Maxton McDowell if there was a sawmill operation, planing operation, and a pallet operation at McDowell Lumber Company prior to 2004, and **Maxton McDowell** answered that is correct. **Morgan** asked Maxton McDowell what years he was a member of the Randolph County Planning Board, and **Maxton McDowell** answered that he served from 1988 to 2005. **Morgan** said that Maxton McDowell was on the Planning Board after Countywide Zoning, and **Maxton McDowell** said yes. **Morgan** asked Maxton McDowell if he was one of the first County Planning Board members, and **Maxton McDowell** answered yes. **Morgan** asked Maxton McDowell if he had any discussions with the Planning Staff in 1988 about the sawmill, and **Maxton McDowell** answered no. **Morgan** asked Maxton McDowell if he ever told the Planning Staff that what McDowell Lumber Company was doing was inappropriate, and **Maxton McDowell** answered no, that he felt what they were doing was wrong but he was told by the staff that it was not. **Morgan** asked Maxton McDowell if he assumed that the property was zoned correctly in 1988, and **Maxton McDowell** answered yes. **Morgan** asked Maxton McDowell if he assumed that what was there at that time in 1988 was zoned correctly in 1987, and **Maxton McDowell** answered that is correct. **Morgan** asked Maxton McDowell if he ever talked with other Board members about other cases

outside of public meetings, and **Maxton McDowell** answered no. **Morgan** asked Maxton McDowell if he felt it would be inappropriate to talk with other Board members about cases outside of public meeting, and **Maxton McDowell** answered no. **Morgan** asked Maxton McDowell if he talked to Board members about his case, and **Maxton McDowell** answered yes. **Morgan** asked Maxton McDowell if he talked to members about the case he recused himself from, and **Maxton McDowell** answered no. **Morgan** asked Maxton McDowell if he tried to convince Board members that he (Maxton McDowell) was right about the case, and **Maxton McDowell** answered yes. **Morgan** asked Maxton McDowell if he spoke with County Commissioners about his case, and **Maxton McDowell** answered yes. **Morgan** asked Maxton McDowell if he spoke with them before the rezoning application process, and **Maxton McDowell** answered no. **Morgan** asked Maxton McDowell if he spoke with Commissioners after the rezoning application process, and **Maxton McDowell** answered yes. **Morgan** asked Maxton McDowell if he talked with the Planning Staff many times since 1988 as a Board member, and **Maxton McDowell** answered yes. **Morgan** showed Maxton McDowell ***Defendant's Exhibit #1*** dated 1987 and asked him what was is the photo, and **Maxton McDowell** answered a lumber company. **Morgan** asked Maxton McDowell if it was a photo of McDowell Lumber Company, and **Maxton McDowell** answered that it could be McDowell Lumber Company. **Morgan** asked Maxton McDowell if the lumber company operations were on both sides of Falling Oak Road, and **Maxton McDowell** answered yes. **Morgan** asked Maxton McDowell if there was a pallet operation at McDowell Lumber Company in 1987, and **Maxton McDowell** answered no. **Morgan** asked Maxton McDowell when the pallet operation began, and **Maxton McDowell** said some time in 2003, before 2004. **Morgan** asked Maxton McDowell if there was a planing operation at McDowell Lumber Company in 1987, and **Maxton McDowell** said he thought there was. **Morgan** said he had no further questions for Maxton McDowell.

**Hornik called his final witness, Michael Watts, MAI, SRA.**

*Morgan said for the record, he objected to this testimony. Morgan said he wanted to know what the nature of this testimony was. Hornik said that he had to prove standing in this case and this testimony was to determine the impact of the McDowell Lumber Company property use to his clients' property.*

**Hornik** presented ***Plaintiff's Exhibit #30*** a document of the witness's qualifications as an expert witness. **Hornik** asked Watts his educational background, and **Watts** answered he is a 1965 graduate of Guilford College with a BA degree in Political Science,

postgraduate courses in Economics at Guilford College and UNCG, several appraisal courses, Certified Appraiser in 1972, and licensed in North Carolina, Virginia, and South Carolina, etc. **Hornik** asked Watts if he had ever done appraisal work for Randolph County and **Watts** answered yes. **Hornik** asked Watts if he had ever testified in Court as an expert witness, and **Watts** answered many times. **Hornik** asked Watts if he was familiar with the property, and **Watts** answered yes. **Hornik** asked Watts if he had ever been to the property, and **Watts** answered yes. **Hornik** asked Watts if he had prepared a report, and **Watts** answered he had performed an appraisal on the Winslow property and prepared a report. **Hornik** presented *Plaintiff's Exhibit #31* a copy of the appraisal report for property located at 5179 Old NC Hwy 49, Asheboro, owned by William Claude Winslow, dated May 25, 2005. **Hornik** asked Watts if he was contacted by Claude Winslow in 2005, and **Watts** answered yes and he inspected the property at that time. **Hornik** asked Watts if he concluded that the Winslow's property had been impacted by an external source, and **Watts** answered yes, the impact was from the adjoining sawmill operation. **Watts** said the noise from the machinery is quite loud and if one is in the Winslow's backyard you cannot talk in a normal voice and be heard. **Watts** said that within 30 minutes of arriving at the Winslow property he could write his name on his dark vehicle from the amount of dust that had covered his vehicle. **Watts** said he didn't feel the property was physically damaged but rather financially damaged by the adjoining sawmill operation. **Watts** said that as of the appraisal date, the value of the property was shown to be severely damaged. *Morgan objected to this testimony.* **Watts** testified that the presences of noise and dust had a detrimental effect on the value of the Winslow's property. **Hornik** asked Watts how recent he was on the property, and **Watts** answered June 2008. **Hornik** asked Watts if any of the detrimental effects to the Winslow's property changed, and **Watts** answered no. **Hornik** asked if his observations at that time confirmed his report, and **Watts** answered yes. **Hornik** asked Watts his conclusion of the impact this operation had to the Winslow property in May 2005, and **Watts** answered that the property has suffered a total loss of \$139,500. **Hornik** asked Watts if the operation damaged the Maxton McDowell property, and **Watts** said he had not appraised that property. *Morgan said he would object to anything Watts would have to say concerning the Maxton McDowell property without an appraisal.* **Watts** answered that the Maxton McDowell property would be subject to influence but probably not to the extent of the Winslow property. **Watts** said that the fact that the Winslow residence is closer to the lumber company would make the impact greater than that to the Maxton McDowell property. **Hornik** said he had no more questions for Watts.

**County Attorney Darren Allen** asked Morgan if he would like to cross-examine this

witness. **Watts** said to Morgan to remember that he hasn't had a drink yet tonight. **Morgan** asked Watts if he would like to get a drink of water, and **Watts** said he was talking about something more like Scotch.

**Morgan** asked Watts if he observed the McDowell Lumber Company operation but had never stepped on the property, and **Watts** said that is correct. **Morgan** asked Watts if he appraised the Winslow property in May 2005 and found the property to be adversely impacted, and **Watts** answered yes. **Morgan** asked Watts if he made an appraisal differential between any specific operations such as the crane as opposed to the dust bin, and **Watts** answered no. **Watts** said that the main areas that create the most problems are shown on *Plaintiff's Exhibit #7* marked #15, #7, #2, and #1. **Morgan** told Watts that is not what the appraisal report says, and **Watts** said no the report says the entire operation. **Morgan** asked Watts if he made this determination understanding the specific operations of McDowell Lumber Company, and **Watts** answered no, he made this determination just from what he viewed. **Watts** said when the saw is operating and the dust is falling, you wouldn't live there either. Watts said he wouldn't want to live there. **Morgan** asked Watts if he had testified earlier about this case, and **Watts** answered that is correct. **Morgan** asked Watts what case was being tried, and **Watts** said it was the case concerning the impact McDowell Lumber Company has on the Winslow property value. **Morgan** asked if it was fair to say it was a nuisance case, and **Watts** answered he was not sure, but yes. **Morgan** asked Watts if the Randolph County jurors agree with his opinion in that Court Case, and **Watts** answered no they did not. *Hornik objected to this questioning.* **Morgan** said he was just asking Watts' opinion. **Morgan** asked Watts if the appraisal he performed was a residential appraisal, and **Watts** answered yes. **Morgan** asked Watts if he considered any other use than residential when determining the value of the property, and **Watts** answered no. Watts said that when property is appraised the highest and best use is first determined and that's the bases when appraising the property. Watts said that for a parcel zoned RA, residential is the highest and best use of the property. Watts said that industrial use would not be the highest and best use. **Morgan** asked Watts if he accounted for the type of land use demand in the area, and **Watts** answered yes. Watts said in his opinion the Winslow property had no commercial or industrial value. Watts said there is no demand for these uses in this area. **Morgan** asked Watts if there had been any decrease in the Winslow property value due to any residential issues, and **Watts** answered no. **Morgan** asked Watts if there were any specific findings to specific buildings on the McDowell Lumber Company property, and **Watts** answered no. **Morgan** asked Watts if it would be fair to say that the sawmill operation as a whole had a detrimental effect on the value of the Winslow property, and

**Watts** answered no, but it would be fair to say the dust and the noise were the detrimental effects.

**Hornik** asked for a re-direct.

**Hornik** asked **Watts** his observations of the property in 2008, and **Watts** said he observed dust from the adjoining pallet making buildings. **Hornik** asked if **Watts** concluded that this devalued the Winslow property, and **Watts** answered yes. **Chairman Jim Rains** asked **Watts** when was the first time he visited the site, and **Watts** answered May 2005. **Hornik** asked **Watts** to indicated on the map known as *Plaintiff's Exhibit #7* which building the noise was coming from, and **Watts** identified the buildings in the area marked #7. **Hornik** asked **Watts** when these buildings were built, and **Watts** answered he had no idea. **Hornik** said he had no more questions for **Watts**.

**Allen** asked **Hornik** when the claim for nuisance was filed, and **Hornik** answered approximately 2006. **Allen** asked **Hornik** what where the elements of his claim for nuisance, and **Hornik** replied that the operation posed a substantial interference to the use and enjoyment of his clients' properties and that they had suffered damages. **Allen** asked when the matter had been resolved by a jury, and **Hornik** responded that it had been resolved in 2008. **Allen** asked **Hornik** his opinion as to whether his clients' damages from the operation of the lumberyard already had been litigated and decided against his clients, and said that damages would be necessary for his clients to have standing to raise the issue to this Board. **Hornik** said he did care if Randolph County found standing or not, because he didn't feel the two issues were the same.

**County Attorney Darren Allen** asked **Morgan** if he would like time for rebuttal, and **Morgan** answered that he had no further evidence to present, but would like to be heard in closing.

### **Closing remarks**

**Hornik** said his clients are not asking that the operation be shut down. **Hornik** said it is undisputed that this property is and has been zoned RA/LI. **Hornik** said the only time this zoning was any different was from May 2005 through the Summer of 2006 and during that time the property was zoned HI-CD. **Hornik** said we filed our complaint with the Superior Court System in May 15, 2005. **Hornik** said the Court of Appeals confirmed in 2007 the decision of the Superior Court System. **Hornik** said there were challenges going

on from the time of the zoning change application process. Hornik said at least since Oct 2004, the property owners knew that the property was not properly designated for their operation. Hornik said from 2004 through 2006 McDowell Lumber Company continued to expand their operation. Hornik said his clients are willing to say that the operation has some sort of non-conforming operation. Hornik said after 2004, the pallet operation was expanded by 8,000 sq. ft., the \$777,295 crane was purchased in January of 2006, the second pallet making operation was added in 2005, and the new chipper building was an addition built in 2007 and 2008. Hornik said the photographs entered into evidence showed these additions. Hornik said he would submit to the Board, under the Zoning Ordinance particularly Non-Conforming Uses, *"If within the districts established by this ordinance, or by amendments that may later be adopted there are lots, structures, and use of land and structures which were lawful before this ordinance was passed or amended, but which would be prohibited under the terms of this ordinance, it is the intent of this ordinance to permit these non-conformance to continue until they are removed, but not to encourage their continuance. Such non-conformance are declared by this ordinance to be incompatible with permitted uses in the districts in which they are located. It is further the intent of this ordinance that non-conformance shall not be enlarged upon, expanded or extended, or used as grounds for adding other structures, or uses prohibited elsewhere in the same district."* that any expansion, under Article XI Section 1, is prohibited. Hornik said the types of enlargements McDowell Lumber Company has made are precisely what the Zoning Ordinance doesn't allow. Hornik said the crane and all the other operation expansions that have been described were added after 2004. Hornik said his clients ask that the application of Zoning Ordinance be rolled back. Hornik said in Johnson's letter he referred to zoning estoppel which doesn't exist in North Carolina. Hornik said the issue of vested rights was raised and the only vested right is common law vested rights. Hornik said to quoted David Owens in saying that substantial good faith reliance must be found and McDowell has not operated in good faith. Hornik said in this case McDowell Lumber Company knew in October 2004 through 2005 that there was opposition to this site. Hornik said he would submit that McDowell Lumber Company could not establish a common law vested right. Hornik said McDowell Lumber Company got building permits, but made expenditures on a mistakenly issued permit. Hornik said McDowell Lumber Company could not show they had a vested right. Hornik said the Zoning Ordinance says no structure shall be built or modified without compliance of this ordinance. Hornik said no permits should have been issued for those uses. Hornik said clearly the Table of Permitted Uses doesn't allow the use unless it is marked. Hornik said it seems that the undisputed evidence in the record proves that the expansion of operation of McDowell Lumber Company was done

improperly. Hornik said they are asking the Code Enforcement Officers of Randolph County to enforce the ordinance and require the removal of the kiln, warehouse, crane, discontinuance of the second pallet operation, removal of the chipper building/facility, and any other expansions made to McDowell Lumber Company's operations after October 18, 2004.

**County Attorney Darren Allen** asked Hornik if he was addressing any alterations that he has not covered in his written appeal. **Hornik** said they wanted everything to be undone. **Allen** asked Hornik if he thought the County had the authority to do that, when those issues were not addressed in the written appeal, and **Hornik** answered yes. Hornik said the County could go back to 1987 but they were not asking the County to do that. Hornik said they were asking for what is right and they are asking the County to go back to when the zoning change application was submitted. Hornik said they think that any improvements McDowell Lumber Company has made should be reverted back to its original state. **Allen** asked Hornik if he was familiar with vested rights and if he agreed that the good faith required for a vested right is based upon a landowner's honest belief that he was not violating the law. **Hornik** answered that he did not. Hornik said he felt once the landowner knew he was not in compliance with the Zoning Ordinance that it was fair game. **Allen** said there is no North Carolina case law expressly adopting the pending ordinance rule. **Hornik** said there is case law of when amendments are pending and the property owner proceeds, he proceeds at his own risk. **Allen** said the courts are looking at specific facts of specific cases only, and **Hornik** agreed with Allen. **Allen** said with regards to the storage sheds, he hasn't heard any evidence of when they were constructed. **Hornik** agreed that there was little evidence on this issue. **Allen** asked Hornik if he wanted to withdraw the storage sheds from consideration by the Board. **Hornik** responded that his clients did not want to do that.

**Morgan** said to not make any mistake, the Winslows are asking this Board to close McDowell Lumber Company. Morgan said the Winslows realize that this would close this operation. Morgan said that he disagreed with Hornik, that he believes that McDowell Lumber Company can show their vested rights. Morgan said that he asked the Board to consider Johnson's letter dated September 12, 2008 and said the letter is what is to be considered. Morgan read Article XI, Non-Conformance, Section 4(d) "*A non-conforming use of a structure shall not be extended or enlarged except into portions of the structure which, at the time the use became non-conforming, were already erected and arranged or designed for such non-conforming use. No structural alterations shall be made in any structure occupied by a non-conforming use, except those required by*

*law or ordinance or ordered by the Zoning Administrator to secure the safety of the structure.”* Morgan said Johnson has why those elements were met in all six (6) cases. Morgan said in September 2007 the Court of Appeal case said the Randolph County Trial Court acted properly to roll zoning back to 1987 was ridiculous. Morgan said the Winslows are now back again and this Board doesn’t have to hear this case. **Allen** asked Morgan to address standing. **Morgan** responded, for the record, that Hornik’s clients do not have any standings. Allen said he wasn’t sure that this Board could make that decision without an immediate claim or controversy before the Board, which has not already been decided. **Morgan** said that Watts didn’t specify what adversely affected his client’s property. **Allen** said Watts said that their property was adversely impacted by the operation, but didn’t specify the affect each specific building/operation had on the property. **Morgan** asked the Board to rule in favor and support Johnson’s decision.

### **Board Deliberation**

**Chairman Jim Rains** closed the public hearing and told attorneys that the Board has sat here and listened to each of them. Rains said the Board is going to talk and now they can sit and listen to the Board. **Allen** said that the County’s position has been consistent with Johnson’s and Morgan’s position on this case. Allen said the specific language in the Non-Conformance Section of the Zoning Ordinance provides the Zoning Administrator the authority to permit minor changes in law to protect public safety and welfare. Allen said Winslow testified to noise, dust, etc., and McDowell Lumber Company has tried to enclose the dust bin to fix some of these problems. Allen said issues have been somewhat whittled away and addressed in the opinion. This board is sitting as a quasi-judicial body and that means that the Board has to have a claim to consider. Allen said he didn’t think the Winslows could prove standing because this same issue has been litigated in Randolph County Superior Court and failed. Allen advised the Board, that this is also something this Board should considered in light of this case. Allen advised the Board that any further deliberations must be done at public meeting.

**Chairman Rains** asked Allen if some of the things listed in the letter were performed to address concerns and make these problems better. **Allen** answered that is correct, that is Randolph County’s position. Allen advised that the issue raised concerning the buffers was invalidated by the previous Court decision. Allen added that the issue of the storage sheds, addressed in the applicant’s complaint, was essentially eliminated because no evidence has been shown and burden of proof lies with applicant. **Pell** said that prior to 2004, the Winslows didn’t want to shut down the pallet operation and the State has



required the sterilization of the pallets. **Joyce** said as a State Inspector he would say . . . **Allen** interrupted Joyce and informed him that he may want to limit speaking from any specialized knowledge otherwise he would open himself up to possibly being cross examine by Hornik or Morgan. Joyce didn't continue his statement. **Joyce** asked if the forestry office could be considered and agricultural use permitted within the RA zoning district, and **Johnson** said it could be.

### **Board Decision**

**Craven** said after hearing all the evidence presented, and studying this thing every since it came to the Board in 2004, he would agree with Johnson's decision. **Joyce** seconded the motion. The motion passed unanimously .

7. The meeting adjourned at 10:39 p.m. There were 10 people present for this meeting.

---

**NORTH CAROLINA  
RANDOLPH COUNTY**

*HAL JOHNSON*

---

**Planning Director**

*JILL WOOD*

---

**Date**

---

**Clerk/Secretary**